Supreme Court, U.S.
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No. 97-1945

In The

Supreme Court of the United States

October Term, 1997

SANDRA L. BENEDICT,

Petitioner,

v.

EAU CLAIRE PUBLIC SCHOOLS, WISCONSIN EDUCATION ASSOCIATION COUNCIL, THOMAS BLOUNT, MICHAEL BURKE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS, WISCONSIN EDUCATION ASSOCIATION COUNCIL, THOMAS BLOUNT, AND MICHAEL BURKE IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED BY RESPONDENTS

The Respondents, Wisconsin Education Association Council ("WEAC" or the "Union"), Thomas Blount and Michael Burke object to the form and substance of the "Questions Presented For Review" in the Petition for a Writ of Certiorari (the "Petition") and believe the question should be posed as follows:

> Whether the Supreme Court has jurisdiction to address Benedict's claims against WEAC, because it was not served with process, and whether there is any reason to address Benedict's claims against Blount and Burke because she voluntarily stipulated to their dismissal before the district court below.

PARTIES

The names of the parties to this case appear in the caption of the Petition.

Wisconsin Education Association Council is a private, voluntary association that provides organizational services to labor organizations that represent public school teachers within the State of Wisconsin.

Thomas Blount is an individual resident of the State of Wisconsin; he is the President of the Eau Claire Association of Educators (the "Association") and a public school teacher employed by the Eau Claire Public School District. The Association, which is not a party to this case, is a WEAC affiliate.

Michael Burke is an individual resident of the State of Wisconsin; he is an attorney employed by the Executive Director of the Northwest United Educators (the "NUE"). The NUE, which is also not a party to this case, is a labor organization that provides collective bargaining and grievance handling services to local bargaining units, such as the Association, in northwestern Wisconsin.

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OPINIONS BELOW

The February 10, 1998 Order of the United States Court of Appeals for the Seventh Circuit is reproduced in the appendix to the Petition for Writ of Certiorari at pp. A2-A21. The Order of the United States District Court for the Western District of Wisconsin dated May 7, 1997 is reproduced in the appendix to the Petition at pp. A42-A43. Benedict's complaint, and various pleadings and orders that followed, refer to the WFT (the Wisconsin Federation of Teachers) and WEAC as though they are the same entity. They are not, but the distinction is irrelevant to review because neither was served with a complaint and the district court dismissed both. The Respondents object to the inclusion of irrelevant documents in the Petition; however, those documents are of no significance for this Court's review.

JURISDICTION

Respondents WEAC, Blount and Burke object to Petitioner's jurisdictional statement which is predicated upon 28 U.S.C. § 1291.

As discussed below, Benedict's action against WEAC was dismissed without prejudice because she failed to serve the organization with process. The Court of Appeals below did not reach the merits of Benedict's claims against WEAC. Relevant to this Court's review is the Court of Appeals holding below (that Benedict did not contest) that Benedict failed to serve the Union with process and, therefore, the Court lacked jurisdiction. (Slip

Op. at p. 7, n. 1; A7). This Court likewise lacks jurisdiction.

As for Blount and Burke, Benedict abandoned her claims against them by stipulation entered in the District Court pursuant to Fed. R. Civ. P. 41(a). Benedict did not challenge that stipulation; thus, the courts below did not consider her appeal against Blount and Burke. Therefore, there is no active controversy against these defendants for this Court to review.

STATEMENT OF FACTS

The facts relevant to the merits of Benedict's claims under the Age Discrimination in Employment Act (the "ADEA"), the Americans with Disabilities Act (the "ADA") and various state statutes are set forth in the Brief in Opposition filed by the Eau Claire Public School District and the opinion of the Court of Appeals below. The courts below did not reach the merits of Benedict's claims against WEAC, Blount or Burke. The facts of this case as they relate to WEAC, Blount and Burke are set forth in the order of the Court of Appeals for the Seventh Circuit and are recited, in relevant part, as follows:

Sandra Benedict brought this lawsuit against her employer, Eau Claire Public School District ("ECPS"), alleging that ECPS violated the Age Discrimination in Employment Act of 1967 ("ADEA"), *see* 29 U.S.C. § 621 *et seq.*, the Americans with Disabilities Act of 1990 ("ADA"), *see* 42 U.S.C. § 12101 *et seq.*, and that ECPS engaged in

retaliatory conduct because she filed her claims of discrimination. Ms. Benedict also alleged that union bargaining representatives Thomas Blount and Michael Burke and the Wisconsin Education Association Council ("WEAC"), a labor organization, breached their duty of fair representation in failing to prosecute her grievances against ECPS. The District Court granted summary judgment for ECPS.

Benedict alleged that WEAC and union bargaining representatives Tom Blount and Michael Burke breached their duty of fair representation by not assisting her in prosecuting her grievances against ECPS. Benedict's action against WEAC was dismissed without prejudice because she failed to serve the organization with process. *See* Fed. R. Civ. P. 4(m); *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104-05 (1987). This Court thus lacks jurisdiction under 28 U.S.C. § 1291 to consider that claim. *See Perry R. Pennington Co. v. T.R. Miller Co.*, 994 F.2d 390, 392-93 (7th Cir. 1993). Similarly, because Benedict abandoned her claims against Blount and Burke in a stipulation entered by the District Court pursuant to Fed. R. Civ. P. 41(a), there is no need to further consider her appeal against these defendants.

SUMMARY OF ARGUMENT

The Petition should be denied because this Court lacks appellate jurisdiction over WEAC and because the Petitioner abandoned her claims, voluntarily and with full consent, against Blount and Burke.

REASONS WHY THE PETITION SHOULD BE DENIED

I. There Is No Appellate Jurisdiction Over WEAC Because WEAC Was Not Served With Process; Further, Benedict Abandoned Her Claims Against Blount And Burke By Stipulating To Dismissal, With Prejudice, Before The District Court.

A. There is no appellate jurisdiction over WEAC because Benedict did not serve the summons and complaint.

It is axiomatic that before a federal court can exercise personal jurisdiction over a defendant, the procedural requirement of service of process must be satisfied. *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104-105 (1987). Benedict does not dispute the absence of service of the summons and complaint. She does not argue that any exceptions apply or should be created. There is no appellate jurisdiction because there is no controversy over whether Benedict served WEAC. The absence of jurisdiction mandates that the petition be denied.

B. Benedict voluntarily abandoned her claims against Blount and Burke, with prejudice before the District Court.

Benedict's stipulation to dismissal of her claims against Blount and Burke was signed by her and by her attorney, and was entered by the District Court under Rule 41(a). It was therefore a wholesale abandonment of her claims – including her right to appeal. Yet, Benedict continues to argue the merits of her claims and ignores the voluntary dismissal. Benedict consented to the end of

her case against Blount and Burke so her Petition should be denied.

"[A] decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause." *Nashville, C. & S. L. Ry. v. United States*, 113 U.S. 261, 266, 5 S. Ct. 460 (1885); *see NLRB v. OCHOA Fertilizer Corp.*, 368 U.S. 318, 323, 82 S. Ct. 344 (1961) (the consent of the parties to the Board's decree "makes a significant difference," foreclosing the Court of Appeals from modifying the consent decree). Again, as with WEAC's jurisdictional objection, Benedict does not contest the voluntariness of her consent or otherwise argue an exception to affirmance of the stipulation and dismissal of her claims against Blount and Burke. *See Swift & Co. v. United States*, 276 U.S. 311, 324, 48 S. Ct. 311 (1928) (setting forth exceptions to general rule of affirming consent decrees).

II. Benedict's Claims Against WEAC, Blount And Burke Were Not Addressed By The Court Below.

This case presents no controversial legal issues: there is no appellate jurisdiction over WEAC and Benedict abandoned her claims against Blount and Burke. Benedict has never challenged these conclusions, so the courts below never reached the merits of Benedict's claims. Therefore, settled legal principles apply to preclude consideration of the merits of Benedict's claims and mandate that the Court deny the Petition.

It is only in exceptional cases "that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927); *see DeShaney v.*

Winnebago County Dept. of Social Servs., 489 U.S. 189, 195 n.2 (1989) (refusing to consider argument raised for first time in petitioner's brief to Court); *Monsanto Company v. Spray-Rite Service Corp.*, 465 U.S. 752, 759 n.6, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984) (declining to consider argument neither raised nor addressed by Court of Appeals); *Brandon v. Holt*, 469 U.S. 464, 473 n.25, 83 L. Ed. 2d 878, 105 S. Ct. 873 (1985) (refusing to consider argument not addressed before Court of Appeals). The present case is not an exceptional case because there is no dispute that WEAC was not served and that Benedict voluntarily abandoned her claims against Blount and Burke.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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